

STATE OF WASHINGTON



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OFFICE OF  
INSURANCE COMMISSIONER

In the Matter of ) NO. D2000-81  
ELIZABETH J. KELSEY )  
Licensee. ) FINDINGS OF FACTS,  
AND ORDER ON HEARING

TO: Elizabeth J. Kelsey  
2108 Madrona Point Drive  
Bremerton, WA 98321

COPY TO: John Frawley, Esq.  
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AND TO: Mike Kreidler, Insurance Commissioner  
Michael E. Watson, Chief Deputy Insurance Commissioner  
J. Scott Jarvis, Deputy Commissioner, Consumer Protection Division  
Carol Sureau, Deputy Commissioner, Legal Affairs Division  
PO Box 40255  
Olympia, WA 98504-0255

Michael E. Grant, Assistant Attorney General  
Office of Attorney General  
PO Box 40100  
Olympia, WA 98504-0100

Pursuant to RCW 34.05, 48.04.010 and WAC 10-08 and after notice to all interested parties and persons, the above-entitled matter came on regularly for hearing before the Insurance Commissioner for the state of Washington on January 11, 2001 and January 23, 2001, with closing arguments being held later by telephone by agreement of the parties.

Pursuant to Chapter 34 RCW, all persons to be affected by the above-entitled matter were given the right to be present at such hearing during the giving of testimony, and had reasonable opportunity to inspect all documentary evidence. The Insurance Commissioner was represented by Michael E. Grant, Assistant Attorney General. Elizabeth J. Kelsey was represented by John Frawley, Attorney at Law.

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Pursuant to RCW 34.05.461(3), the parties are advised that they may seek reconsideration of this Order by filing a request for reconsideration under RCW 34.05.470 with the undersigned within 10 days of the date of service of this Order. Further, the parties are advised that pursuant to RCW 34.05.514 and 34.05.542, this Order may be appealed to Superior Court by filing a petition in the Superior Court, at the petitioner's option, for (a) Thurston County or (b) the county of the petitioner's residence or principal place of business, within 30 days of service of this Order. For further information or to obtain copies of the applicable statutes, the parties may contact the administrative assistant to the undersigned.

NATURE OF PROCEEDING

The purpose of the hearing was to take testimony and evidence and hear argument as to whether it is reasonable that the Insurance Commissioner's Order of Revocation, No. D 2000-81, should up upheld, set aside, or modified.

FINDINGS OF FACTS

Having considered the evidence and arguments presented at the hearing, and the documents on file herein, the presiding officer designated to hear and determine this matter finds as follows:

1. The hearing was duly and properly convened and all substantive and procedural requirements under the laws of the state of Washington have been satisfied.
2. Elizabeth J. Kelsey ("Licensee") is an individual who has held a life and health insurance agent's license in the state of Washington since approximately 1984 and has worked fairly continuously as a life and health insurance agent in the state of Washington since that time. She is a high school graduate and also attended North Seattle Community College.
3. Pushpa Nair is a woman who, since 1993, has owned a grocery store on Sandpoint Way in Seattle. Ms. Nair, her two daughters, and her mother work at the store.
4. On or about May 1998, Ms. Nair's property and casualty insurance agent referred her to the Licensee because Ms. Nair desired to purchase health insurance for herself and possibly other members of her family.

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5. In an effort to sell health insurance to Ms. Nair, the Licensee came to Ms. Nair's store. Subsequently, Ms. Nair purchased, with the Licensee acting as the agent, health care service contracts issued by Blue Cross for herself and part of her family. Ms. Nair also discussed the purchase of life insurance from the Licensee.

6. Following her purchase of health insurance, the Licensee appeared at Ms. Nair's store for the first few months after the effective date of the coverage in order to collect the monthly premium due. These premiums were paid by check written to "Blue Cross."

7. During the course of these visits, and in her capacity as an insurance agent, the Licensee advised Ms. Nair that she was authorized to sell investments with her father. At that time, Ms. Nair, who had very little investment experience, had already invested money with Prudential and Janus. The Licensee informed Ms. Nair that the Park Avenue Fund, which is affiliated with Guardian Life Insurance Company ("Guardian Life"), was a fund which "will never lose money" and that there would be no taxes if Ms. Nair took her money out of Janus. The Licensee provided Ms. Nair with three applications to open investment accounts associated with Guardian Life, one for herself and one for each of her two daughters. Ms. Nair signed these three applications which the Licensee then took with her; Ms. Nair did not receive copies of these applications. (Testimony of Pushpa Nair.)

8. Based upon the information given to her by the Licensee, and with the intent to follow the Licensee's advise to invest in the Guardian Park Avenue Fund, on July 17, 1998 Ms. Nair wrote her check No. 3677 (Ex. 2a) in the amount of \$3,000 made payable to "Guardian Park Avenue Fund." (Testimony of Pushpa Nair.)

9. Thereafter, the Licensee advised Ms. Nair to simply make these investment checks payable to "Guardian." Accordingly, on August 13, 1998 (check Nos. 3682 and 3683), September 2, 1998 (check No. 3688), September 29, 1998 (check No. 3691), October 1, 1998 (checks Nos. 3692, 3693 and 3694), June 1, 1999 (check No. 3732), June 11, 1999 (check No. 3735), and August 18, 1999 (check No. 3744), Ms. Nair wrote checks made payable to "Guardian" or "The Guardian." These checks were all picked up by the Licensee on the many occasions when the Licensee visited Ms. Nair's grocery store. Ms. Nair intended that the Licensee, as an agent of Guardian Life, would send these checks to Guardian Life for investment in its Park Avenue Fund on behalf of herself and her two daughters. These eleven checks totaled \$50,300, including her first check, No. 3677 referenced above. Copies of the all of the eleven afორereferenced checks are admitted as Exhibits 2, 2a and 2b. (Testimony of Pushpa Nair and Licensee.)

10. Although after a few months Ms. Nair began submitting her premiums for health insurance to Blue Cross directly, the Licensee always came to Ms. Nair's store to personally pick up her checks for her investments in the Guardian Park Avenue Fund.

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11. Upon receipt of the aforementioned eleven checks, the Licensee altered the checks to write in her own name as a payee (along with "Guardian Park Avenue Fund", "The Guardian" or "Guardian" as payee written by Ms. Nair). As to check Nos. 3677, 3682, 3683, 3688, 3691, 3692, 3632 and 3744 totaling \$25,600, the Licensee then cashed these eleven checks by endorsing them with her own name. Check Nos. 3693 and 3694, totaling \$24,500, were deposited to an account with U.S. Bank in Seattle. Check No. 3735 was either cashed or deposited without endorsement. This activity resulted in litigation by Guardian Life against the Licensee, U.S. Bank and Group Health Credit Union (Ex. 7). As to all of the funds represented by all of these eleven checks, the Licensee never sent them to Guardian Life or to any other account or repository for the credit of Ms. Nair or her daughters. (Testimony of Gordon Wylie.)

12. At all times the Licensee received the checks which Ms. Nair intended for investments in Guardian Life Insurance Company. The Licensee was an agent for Guardian Life Insurance Company. However, although she was authorized to sell specified insurance products of that company, she had no authority to sell the products she purported to sell to Ms. Nair. The Licensee used her relationship with Ms. Nair as an insurance agent for health insurance and for Guardian Life to solicit her investment in other products of Guardian Life which she was not authorized to sell.

13. In order to further deceive Ms. Nair, after the time of Ms. Nair's initial investment in the Guardian Life product, the Licensee prepared, or caused to be prepared, false certificates purporting to show that the investments had been made with Guardian Life. Three of those certificates purport to show investments in the "Guardian Park Avenue Fund." Two others purport to show investments in the "At Home Funds, Inc." These certificates reflect very substantial gains purportedly accrued by the funds invested. Specifically, these certificates reflect that Ms. Nair's initial \$50,100 total investments had grown to \$142,976.21 or higher. (All five certificates are entered as Ex. 3.)

14. After preparing, or causing the preparation of, the abovereferenced certificates, the Licensee sent several of them by Federal Express to Ms. Nair with airbills purporting to show they were sent from Guardian Life in New York, when in fact they were sent from Seattle, Washington. Others of these certificates were faxed to Ms. Nair from a fax machine either owned or under the control of the Licensee.

15. The objective of the Licensee in preparing, or causing to be prepared, the abovereferenced certificates and sending them to Ms. Nair was to further deceive Ms. Nair into believing that the Licensee had actually invested Ms. Nair's money in legitimate investments in the Park Avenue Fund and in At Home Funds, Inc.

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16. The Licensee was Ms. Nair's insurance agent relative to both health and life insurance. The Licensee had gained Ms. Nair's confidence partly because of her relationship with Ms. Nair as her insurance agent for these other products. The Licensee used that confidence to convince Ms. Nair to divert her money from other investments and savings into the hands of the Licensee.

17. Eventually, Ms. Nair became suspicious of the Licensee's activities in regard to her investments. After inquiry by Ms. Nair to Guardian Life, it was discovered that the Licensee had never invested Ms. Nair's money in Guardian Life or any of its affiliates as she had represented. Based upon this information, and based upon the fact that the Licensee was an agent for Guardian Life, Guardian Life paid Ms. Nair \$53,900 to make her whole from the losses suffered because of the Licensee's conduct. This amount includes the original total \$50,100 which Ms. Nair believed she was investing, plus reasonable accrued interest; this amount is far less than the \$142,976.21 or more which the Licensee had lead Ms. Nair to believe she had in the investment accounts. (Testimony of Gordon Wylie.)

18. The actions of the Licensee in deceiving Ms. Nair by taking her checks and altering them, and diverting these funds, and in leading Ms. Nair to believe they had been properly invested, and in continuing this deception by preparing or causing to be prepared certificates reflecting Ms. Nair's nonexistent investments, were wilful and deliberate acts of deception on the part of the Licensee.

19. Based upon separate facts concerning disappearance of cash which occurred during the Licensee's visits to Ms. Nair's grocery store in her capacity as an insurance agent, the Licensee plead guilty (Afford Plea) to Second Degree Attempted Theft in King County Superior Court (Ex. 4, testimony of Ms. Dworkin, testimony of Ms. Nair).

20. Based upon the activities found above, the Licensee has shown herself to be, untrustworthy and a source of injury and loss to the public and not qualified to be an insurance agent in the state of Washington.

21. Witnesses for the Licensee included herself and Lisa Dworkin. The Licensee presented her testimony in a fairly detailed and forthright manner. She was not, however, a credible witness. At each instance the Licensee appeared surprised by the allegations against her; it is not believable that in each instance could truly have believed herself to be handling Ms. Nair's funds in an appropriate manner. Further, the Licensee tended to present herself as naive about the responsibilities of an insurance agent and blame her activities on Ms. Nair and others and accepted no substantial amount of responsibility herself. It is not clear to the undersigned whether the Licensee knows right from wrong.

22. Lisa Dworkin, who appeared on behalf of the Licensee by telephone, is an attorney employed by the Office of the Public Defender in Seattle. She represented the Licensee in the criminal

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action taken against her relative to Ms. Nair (Finding of Fact 18 above). Ms. Dworkin presented her testimony in a credible and forthright manner without exhibiting any particular biases.

23. Witnesses for the Commissioner included Pushpa Nair, Gordon Wylie and Cheryl A. Penn. Pushpa Nair, who appeared both personally and later by telephone, presented her testimony in a detailed, credible and forthright manner without exhibiting any particular biases. Although she immigrated some years ago from India and English is not her native language, she is clearly very articulate and a conscientious, industrious businesswoman. She clearly appeared to be an innocent victim in her transactions with the Licensee.

24. Gordon Wylie, who appeared by telephone as a witness on behalf of the Commissioner, holds the position of Senior Counsel with Guardian Life Insurance Company. He had been party to the investigation of the matter at issue here. Mr. Wylie presented his testimony in a forthright, detailed and credible manner with no apparent biases.

25. Cheryl A. Penn, who appeared personally as a witness on behalf of the Commissioner, holds the position of Investigator with the Office of the Insurance Commissioner. She was the investigator in charge of investigating the facts detailed herein. Ms. Penn presented her testimony in a forthright, detailed and credible manner with no apparent biases.

26. This case has involved an unusually high number of serious, and complicated, allegations against the Licensee which has taken the undersigned much more than the average time to review and evaluate in order to write and enter this final order. For these reasons, together with additional workload coincident with a change of administration which has occurred during the period of hearing and decision making in this case, good cause has been shown that it is reasonable that on April 24, 2001 the undersigned granted an extension of time to enter these Findings of Facts, Conclusions of Law and Order on Hearing until July 3, 2001.

27. The Insurance Commissioner's Order Revoking License, No. D 2000-81, revoking the insurance agent's license of Elizabeth J. Kelsey, is reasonable under the circumstances and should be upheld.

CONCLUSIONS OF LAW

1. Pursuant to the above Findings of Facts, to the effect that the Licensee took checks from Pushpa Nair which were intended for investments in Guardian Life Insurance Company but instead diverted these funds to her own use through altering and otherwise misusing these checks, and to the effect that the Licensee later took continuing actions meant to continue to deceive Ms. Nair as to the legitimacy of her investments, the Licensee has shown herself to be untrustworthy,

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or incompetent, and has not established that she is qualified to retain her insurance agent's license in the state of Washington as contemplated by RCW 48.17.070.

2. Pursuant to the above Findings of Facts, to the effect that the Licensee deliberately diverted the funds of Ms. Nair and deliberately continued to attempt to deceive her as to the handling of these funds, the Licensee has wilfully violated or knowingly participated in the violation of provisions of the insurance code and regulations of the commissioner as contemplated by RCW 48.17.530(1)(b); has misappropriated or converted to her own use or illegally withheld moneys required to be held in a fiduciary capacity as contemplated by RCW 48.17.530(1)(d); has engaged in fraudulent transactions as contemplated by RCW 48.17.530(1)(e).

3. By her activities detailed in the above Findings of Facts, the Licensee has shown herself to be, and is so deemed to be, incompetent, or untrustworthy, or a source of injury and loss to the public as contemplated by RCW 48.17.070(1)(h).

4. Pursuant to RCW 48.17.070 and RCW 48.17.530(1)(b), (d), (e), and (h), the Insurance Commissioner's Order of Revocation, No. D 2000-81, revoking the insurance agent's license of Elizabeth J. Kelsey, should be confirmed.

5. Pursuant to Finding of Fact 26 above, an extension of time to file these Findings of Facts, Conclusions of Law and Order on Hearing was properly granted, for good cause shown, pursuant to RCW 34.05.461(8).

ORDER

On the basis of the foregoing Findings of Facts and Conclusions of Law, to the effect that the Licensee 1) has shown herself to be untrustworthy, or incompetent, and has not established that she is qualified to retain her insurance agent's license in the state of Washington as contemplated by RCW 48.17.070; 2) wilfully violated or knowingly participated in the violation of provisions of the insurance code and regulations of the commissioner as contemplated by RCW 48.17.530(1)(b); 3) misappropriated or converted to her own use or illegally withheld moneys required to be held in a fiduciary capacity as contemplated by RCW 48.17.530(1)(d); 4) engaged in fraudulent transactions as contemplated by RCW 48.17.530(1)(e); and 5) by these activities has shown herself to be, and is so deemed to be, incompetent, or untrustworthy, or a source of injury and loss to the public as contemplated by RCW 48.17.070(1)(h),

IT IS HEREBY ORDERED that the Insurance Commissioner's Order of Revocation, No. D 2000-81, revoking the insurance agent's license of Elizabeth J. Kelsey, is upheld.

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IT IS FURTHER ORDERED that Elizabeth J. Kelsey shall submit her insurance agent's license to the Commissioner within 10 days of the date of entry of this Order.

IT IS FURTHER CONFIRMED that on April 24, 2001 an extension of time to file these Findings of Facts, Conclusions of Law and Order on Hearing until July 3, 2001 was properly granted pursuant to RCW 34.05.461(8), based upon good cause shown.

This Order is entered pursuant to Chapter 34.05 RCW, WAC 10-08-210, Chapter 48.04 RCW, 48.17.070 and RCW 48.17.530(1)(b), (d), (e) and (h).

This Order is entered at Olympia, Washington, this 2nd day of July, 2001.

A handwritten signature in black ink, appearing to read 'Patricia Petersen', written in a cursive style.

PATRICIA D. PETERSEN  
Chief Hearing Officer and Presiding Officer